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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JOAN R. ROBACK, Plaintiff and Respondent, v. ALBERT A. GRENIER et al., Defendants and Appellants.	A133710 (San Mateo County Super. Ct. No. PRO 113829)

The conservator of the estate of Mary D. Bertolina filed a petition under Probate Code section 850 alleging that appellants Albert A. Grenier and Laraine L. Grenier[1] assisted and conspired with Mary's son, Richard, and related parties, in the financial elder abuse of Mary. (See Welf. & Inst. Code, § 15600 et seq.; Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Law).) Joan R. Roback, Mary's daughter, substituted in as the petitioner in the proceeding after Mary's death in 2006. Following a court trial, judgment was entered against Richard and related parties, as well as the Greniers and their family trust, for $1,306,946.62, plus prejudgment interest and attorney fees. The Greniers challenge the judgment on multiple procedural and substantive grounds.

We vacate the judgments against Laraine and the "1987 Grenier Living Trust" (the Grenier Trust), and modify the judgment against Albert to reduce the award of damages

[1] To avoid confusion and meaning no disrespect to the parties, we will refer hereinafter to Mary Bertolina, her son Richard Bertolina, and the Greniers individually by their given names.

and prejudgment interest against him. The judgment against Richard and related parties is unaffected by this appeal.

I. BACKGROUND

A. *Facts*

Neither appellants nor respondent on this appeal have presented a coherent summary of the underlying facts supported by citations to the record, and the trial court's statement of decision contains no such summary. The trial testimony—besides being conflicting and sometimes evasive—was elicited in such a disjointed fashion that it is difficult to reconstruct an organized, chronological narrative out of it. The following summary of the facts is the best that can be fashioned from the materials at hand.

In 1947, Mary and her spouse acquired a one-half interest in a multi-unit property at 438–440 32nd Avenue in San Francisco (the property). The other half-interest, known as 440 32nd Avenue, was owned in joint tenancy by Mary's parents, Grace and Joseph. Joseph died in 1958 and Grace succeeded to his interest. Mary's husband died in 1966 and she succeeded as surviving joint tenant to the entire one-half interest known as 438 32nd Avenue. In 1978, Grace deeded her one-half interest in the property to her four children, including Mary. After Grace died in November 1978, Mary wished to buy out her siblings' interests and own the entire property. To come up with the $90,000 required ($30,000 per sibling), Mary used $15,000 of her funds and, with the assistance of her son, Richard, borrowed $75,000 through Pan American Savings (Pan American loan). To facilitate the loan, Richard's name was placed on the property and a tenancy in common agreement executed in which Richard was to have ownership of one-half of the property (and make certain payments). Richard did not put up any of his own funds for the buy-out.

According to Mary's brother, Frank Ruggiero, it was never Mary's intent to sell one-half of the property to Richard. Her intent was for Richard and his sister, Joan Roback, to receive the property in equal shares upon her death, as evidenced by her 1978 will and 1998 trust, which both provided for her estate to be equally divided between them. Nonetheless, Richard borrowed approximately $275,000 against the property in

the succeeding years, getting Mary to sign the loan papers, and used the proceeds for his own purposes, including paying off the original Pan American loan for which he had ostensibly received his one-half interest in the property.[2]

Mary suffered a stroke in April 2001 at age 82, and was hospitalized and then transferred to a skilled nursing facility. She began showing signs of a mental disorder and was placed in a convalescent hospital where she remained until her death in December 2006.

In July 2002, at Richard's initiative, Mary's half of the property (438 32nd Avenue) was sold to Albert and Laraine Grenier as trustees of the Grenier Trust for $300,000, with the transaction recording on August 1, 2002.[3] Mary's signature on the conveyance may have been forged, and she was unaware she was selling her home due to her failing health and mental incapacity.[4] The only consideration Mary received from the proceeds of the transaction was an annuity costing $31,000. Despite allegedly telling Roback that an annuity of approximately $300,000 would be purchased for Mary with the proceeds, Richard used most of the $300,000 to pay off some of the outstanding loans against the property, totaling approximately $275,000.[5] As part of the same transaction, Richard and the Grenier Trust borrowed approximately $435,000, secured by the property. Richard paid Roback $59,000 out of escrow, a payment she testified was

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[2] The Pan American loan may have been refinanced in 1992. In any event, either the original loan or the refinance loan were paid off in the 2002 transaction that gave rise to this proceeding.

[3] No documents evidencing the 2002 transfer of Mary's interest were made part of the record on appeal. The first amended petition alleges the deed was "in favor of Albert A. and Laraine L. Grenier, Trustees of the 1987 Grenier Living Trust UDT 11-24-87."

[4] These facts were deemed admitted by Richard after he failed to respond to requests for admissions concerning them despite being ordered to do so.

[5] Roback's damages calculation shows a $175,000 loan paid off in the 2002 transaction. According to Richard's deemed admissions, the total paid off in 2002 was $275,000. According to Roback's posttrial memorandum, the figure was approximately $266,000. The statement of decision puts the figure at "over $200,000."

intended as "hush money," and he received $129,661.[6] Sixteen months later, in November 2003, Richard and the Grenier Trust joined in a sale of the entire 32nd Avenue property for $1 million to Richard's son and a third party. Roback's valuation expert testified the property could have been sold for approximately $1 million in 2002. Based on this testimony, the trial court found the value of the property sold to the Greniers in 2002 was $500,000, not $300,000.

B. *Trial Court Proceedings*

The action was tried on a first amended petition originally filed on behalf of Mary on March 15, 2006 by Debra Dolch, a conservator nominated by Roback.[7] Among other things, the petition alleged financial elder abuse against Richard, his family members, and their family trust, as well as Albert, Laraine, and the Grenier Trust. The petition sought "actual and exemplary damages according to proof" and did not specify any amount of actual damages.

The same day she substituted in as petitioner in 2007, Roback filed a "Return of Summons and Proof of Personal Service on Laraine L. Grenier," purporting to show that substituted service had been effected on Laraine a year earlier, in April 2006. Attached affidavits of reasonable diligence show that personal service of the summons and first amended petition on Laraine was first attempted March 20, 2006 at 1575 Newlands Avenue in Burlingame, California. As to that attempt, the process server stated under penalty of perjury: "Spoke to Amy Grenier and she has never heard of [Laraine Grenier]. Her and her husband Duncan Grenier bought the house a few years ago. They don't know of any relatives by that name either." A second affidavit states that attempts to

[6] Richard insisted Roback had pressured him to sell Mary's interest before he wanted to, in order to allow Mary to qualify for Medi-Cal benefits that would preserve her estate for Roback's benefit. Roback testified she only agreed to the sale on condition that Mary receive a $300,000 annuity, and had no idea of the extent of the loans Richard had taken against the property.

[7] After Mary died on December 28, 2006, the conservatorship was terminated and the court transferred the right to maintain an action for elder abuse to Roback who substituted in as the petitioner on April 16, 2007.

personally serve Laraine were made on March 31, 2006, and again on April 4, 2006, at a UPS Store in Foster City. The March 31 entry states: "This is the UPS store. Subject does have a mailbox here." The affidavit further states that on April 5, 2006, "Substitute service was made at the relocated address," referring to the Foster City UPS Store. The proof of service states the summons and first amended petition were served by substituted service on Laraine by (1) leaving the documents on April 5, 2006 at 11:05 a.m. with or in the presence of Miguel Andrada, "A person . . . at least 18 years of age apparently in charge of the office or usual place of business of the person served," and (2) mailing them to the Foster City UPS Store on April 6, 2006. The proof of service states, "The 'Notice to the Person Served' (on the Summons) was completed as follows: [¶] a. as an individual defendant."

The proof of service for Albert also states the notice to the person served on his summons was completed, "a. as an individual defendant." He was also served by substituted service on April 5, 2006 at 11:05 a.m. by leaving the documents with Miguel Andrada at the Foster City UPS Store. No proof of service in the record shows service on either Albert or Laraine in their capacities as trustees of the Grenier Trust.

One month after filing the proof of service on Laraine, Roback requested entry of a default and court judgment against her. A default was entered by the clerk on that date. The proof of service of the request for default showed it was mailed to Laraine at the same residence on Newlands Avenue in Burlingame where the occupants had previously told Roback's process server Laraine did not live there and they did not know who she was. Roback represented at trial that Laraine's default was later withdrawn.

The trial was conducted over seven days in 2009 and 2011.[8] Albert and Richard appeared in pro. per. Roback was represented by attorney Richard Canatella. Laraine and the Grenier Trust did not appear. The action was tried on the theory that Richard and

[8] Richard filed a bankruptcy petition in October 2009. The trial was suspended pending relief from the automatic stay and trial resumed in 2011 after the stay was modified to allow the action to proceed.

Albert conspired to commit financial elder abuse by taking Mary's one-half interest in the property.

C. *Trial Court Decision and Judgment*

Roback completed the presentation of her evidence on the last day of trial. Respondents Richard and Albert each testified on their own behalf that same day. Albert testified in narrative form for a few minutes and was briefly cross-examined by Roback's counsel, which was all completed in less than an hour. When counsel completed his cross-examination just before 5:00 p.m., the trial court announced that the case was submitted by order of the court, stating: "We have exceeded our time estimate." The court allowed all parties to file written final arguments. Asked by Roback's counsel if the court would issue a tentative statement of decision, the court stated it would.

On May 9, 2011, the trial court filed and served by mail a "Decision After Trial." The court found by clear and convincing evidence that Richard committed financial elder abuse against his mother by his conduct concerning (1) the sale of his mother's one-half interest to Albert "for a possibly below market price at a time when she was incapable of intelligent or reasoned discussion," and (2) the use of the proceeds to pay off loans for which he should have been solely responsible. As to Albert, the court found his testimony deceptive, but concluded "petitioner has not met her burden of clear and convincing evidence to find that Albert Grenier conspired to commit financial elder abuse," and proposed to enter judgment in his favor. Based on Mary's half-interest in the property being sold to the Grenier Trust for $200,000 less than it was worth, and disinheriting Richard of his share of the amount recoverable from him by her estate pursuant to Probate Code section 259,[9] the court concluded restitution was due from Richard to Mary's estate in the amount of $258,617. The court denied punitive or double

[9] Under Probate Code section 259, a person found liable for financial elder abuse of the decedent is not entitled to receive any share of the damages or costs awarded to the estate as a result of the successful prosecution of the elder abuse claim. (Prob. Code, § 259, subds. (a), (c).) "[T]he statute does not necessarily disinherit an abuser entirely but rather restricts the abuser's right to benefit from his or her abusive conduct." (*In re Estate of Dito* (2011) 198 Cal.App.4th 791, 803, fn. omitted.)

damages due to a finding Roback had unclean hands—based on evidence she also sought to have the property sold, and her acceptance of $59,000 from the transaction. The tentative decision did not mention or discuss any potential liability of Laraine or the Grenier Trust.

On May 17, 2011, Roback submitted a "Request for Statement of Decision with Statement of Controverted Issue[s] Specified in the Request" to the court which, for an unexplained reason, was not filed by the court until three months later, on August 22, 2011. The document was apparently signed and served on May 17, 2011.[10] Roback asked the court to address the controverted issue of whether she was required to prove the alleged conspiracy between Albert and Richard by clear and convincing evidence rather than by a preponderance of the evidence. Although the request indicated a hearing would be held on it at a date and time to be announced, no such hearing was ever scheduled. Instead, on August 25, 2011, the court ordered Roback to prepare and file a proposed statement of decision, including a standard of proof finding concerning Albert, within 30 days. Roback submitted a proposed statement of decision and proposed judgment on or about August 31, which the court entered with minor modifications on October 5, 2011 as its statement of decision and judgment. Albert filed no counterproposal to Roback's request for a statement of decision, and no objection to the proposed statement of decision or to any procedural defaults or prejudice arising from the delayed filing of Roback's request for statement of decision, or the failure to hold a hearing on the request.

The October 5 statement of decision differed materially from the court's decision after trial filed on May 9. The trial court found the proper standard of proof of financial

[10] The proof of service erroneously shows it was served on April 20, 2011—more than two weeks *before* the trial court's decision had even been filed or served. However, the statement of decision eventually entered by the court states the request for a statement of decision was served on May 17. That is the date on which Roback's counsel apparently signed the request. According to the attached, misdated proof of service, the document was served by mail on Laraine and the Grenier Trust at the Newlands Avenue address in Burlingame, which Roback's counsel had previously been informed had no connection to the Greniers.

elder abuse and conspiracy was preponderance of the evidence, not clear and convincing evidence. It determined that Albert was in fact liable for assisting and conspiring with Richard in the wrongful taking of Mary's one-half interest in 438–440 32nd Avenue and conversion of it to their own use and benefit. (See Welf. & Inst. Code, § 15610.30, subd. (a).) It further found by clear and convincing evidence that Richard's actions were malicious and subjected him to punitive damages. As to Albert, the court also found it was reasonable to infer he played a role in the forgery established by Richard's deemed admissions. The statement of decision did not mention or discuss the liabilities, if any, of Laraine individually or as a trustee of the Grenier Trust.

The court's damages determinations in the October 5 statement of decision were also much more adverse to Richard and Albert than those in its May 9 decision after trial. First, the court calculated that since Richard was disinherited under Probate Code section 259, he should pay Roback $653,423.31, rather than $258,617.83, since—contrary to what was stated in the decision after trial—the latter figure was only the amount of the payment necessary to *equalize* Richard's and Roback's shares of Mary's estate and did not take his statutory disinheritance into account. The higher figure included Richard's share of the property taken plus the equalization amount.

Second, the court doubled the damages under Probate Code section 859, which subjects a person to liability for double the value of property recovered for an estate if the person liable "has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate . . . ." The court doubled the "compensatory" damages of $653,423.31 to $1,306,946.62, although it did not discuss the evidence it relied upon to find bad faith on the part of either Richard or Albert.

Third, the court awarded prejudgment interest of 10 percent per annum on the amount of $653,423.31, under Civil Code section 3287, which it calculated to be $339,778.52.[11]

[11] There is an arithmetic error in the court's calculation of the amount of interest that accrues per month on the principal amount under the stated rate. The error results in overstating prejudgment interest by over $56,000.

Judgment was entered against Albert, Laraine, and the "Grenier Family Trust" for (1) actual damages of $653,423.31; (2) double damages of $1,306,946.62; (3) 52 months of prejudgment interest totaling $339,778.52; and (4) attorney fees. This timely appeal followed.

II. DISCUSSION

Appellants contend (1) the judgments against Laraine and the Grenier Trust must be vacated due to defective service of process and/or lack of notice of the damages being sought, (2) the trial court erred as a matter of law and procedure in adopting and entering judgment based on Roback's proposed statement of decision, and (3) the trial court erred in its determination of the amount of damages against all of the appellants. We agree in part with appellants' contentions, and will reverse the judgments against Laraine and the Grenier Trust, and modify the judgment to reduce the award against Albert.

A. *Validity of the Judgment Against Laraine*

Service of summons on third parties in a proceeding to recover property for an estate must comply with the requirements of Code of Civil Procedure section 413.10 et seq. (Prob. Code, § 17203, subd. (b).) Compliance with the statutory procedures for service of process is essential to establish personal jurisdiction. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) "A summons is the process by which a court acquires personal jurisdiction over a defendant in a civil action. . . . Notice of the litigation does not confer personal jurisdiction absent substantial compliance with the statutory requirements for service of summons." (*MJS Enterprises, Inc. v. Superior Court* (1984) 153 Cal.App.3d 555, 557.) If the original service of process fails to confer personal jurisdiction, all that follows is void. (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 809.) Consequently, the question whether a judgment is void for lack of personal jurisdiction is never waived and may be raised for the first time on appeal. (*Twine v. Compton Supermarket* (1986) 179 Cal.App.3d 514, 518.)

The filing of a proof of service complying with statutory requirements creates a rebuttable presumption of valid service. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441–1442 (*Dill*).) Here, the record shows on its face Laraine was

served by substituted service in compliance with Code of Civil Procedure sections 415.20, subdivision (b) and 417.10, subdivision (a).[12] Although the presumption can be dispelled by evidence the service was not proper, no such evidence was ever provided to the trial court. At one point in the trial court proceedings Albert asserted Laraine had never been properly served. The trial court responded that this was a moot point since no motion to strike or objection to the proof of service had been made.

While Laraine may challenge service for the first time on appeal, we are not required to take additional evidence for that purpose that could and should have been presented in a motion to quash service or vacate the judgment made in the trial court. There is no claim here that Laraine was unaware of the trial court proceeding or of the judgment taken against her. Accordingly, Laraine carries the burden of establishing that the affidavit of service is defective on its face and shows the judgment is void for lack of personal jurisdiction. " 'A judgment . . . is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll.' [Citation.] In a case in which the defendant does not answer the complaint, the judgment roll includes the proof of service." (*Dill, supra*, 24 Cal.App.4th at p. 1441.) With regard to the sufficiency of the proof of service, Laraine's only argument is that service on a private mailbox is per se improper, citing *Bonita Packing Co. v. O'Sullivan* (C.D.Cal. 1995) 165 F.R.D. 610 (*Bonita*).

Code of Civil Procedure section 415.20 provides that if no physical address is known, a person may be served by "leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, *or usual mailing address other than a United States Postal Service post office box*, in the presence of a

[12] Code of Civil Procedure section 417.10 states in relevant part: "Proof that a summons was served on a person within this state shall be made: [¶] . . . [i]f served under Section . . . 415.20, or 415.30, by the affidavit of the person making the service showing the time, place, and manner of service and facts showing that the service was made in accordance with this chapter. The affidavit shall recite or in other manner show the name of the person to whom a copy of the summons and of the complaint were delivered, and, if appropriate, his or her title or the capacity in which he or she is served . . . ."

competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box . . . ." (*Id.*, subd. (b), italics added.) In *Bonita*, the federal district court construed the italicized language to encompass private mailboxes as well as United States Postal Service boxes. (*Bonita, supra,* 165 F.R.D. at p. 614.) The court stated in *Bonita*: "[T]he Legislature, in specifically excluding United States Postal Service post office boxes from coming within the phrase 'usual mailing address,' has shown its intention to preclude substituted service at postal boxes. In the Court's opinion, a private post office box is akin to a United States Postal Service post office box; and unlike a 'dwelling house,' 'place of abode' or 'place of business.' " (*Ibid.*, fn. omitted.) Further, the court in *Bonita* relied on the fact a better method of service was easily available to the plaintiffs. (*Ibid.*) California appellate cases have rejected *Bonita*'s reasoning, concluding that if the Legislature had intended to exclude private mailboxes along with United States Postal Service boxes, it would have said so. (See *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1203; *Ellard v. Conway* (2001) 94 Cal.App.4th 540, 546.) We agree with the latter cases. We find the proofs of service on file in the trial court were sufficient to create a presumption of valid service, which Laraine has not dispelled. She has not met her burden of showing the judgment against her is void for lack of personal service.[13]

Laraine also submits the default taken against her should be set aside on the independent ground that she was never provided notice of the damages being sought against her. She correctly points out the petition did not specify an amount of damages and she was never served with notice of the damages being sought from her to give her one last chance to appear and defend the action. (*Stevenson v. Turner* (1979) 94 Cal.App.3d 315, 319–320 (*Stevenson*) [applying Code Civ. Proc., § 425.11, which

[13] We deny as moot Roback's motion that we take judicial notice of the transcript of Laraine's debtor's examination.

applies to actions to recover damages for "personal injury or wrongful death"].)[14] Roback argues on appeal that she was precluded by Code of Civil Procedure section 425.10, subdivision (b) from stating the amount of damages she was seeking in the petition. Section 425.10, subdivision (b) provides that the complaint shall not state the amount of damages demanded *in personal injury cases*. Thus, Roback impliedly concedes this was a personal injury case in which she was required to serve a statement of damages under section 425.11 in order to take Laraine's default.[15] (Code Civ. Proc., § 580 [relief granted in default proceeding cannot exceed that demanded in complaint or in the statement required by § 425.11].) Although Roback denies a default was ever taken against Laraine, the record discloses a clerk's default *was* entered against Laraine on May 17, 2007, and we have found nothing in the clerk's transcript showing Roback ever withdrew that default. Attorney Canatella's representation to the court midtrial that he had withdrawn the default is insufficient to establish that fact. The default judgment against Laraine is therefore void and must be vacated. (*Stevenson*, at pp. 318–320.)

Assuming for the sake of analysis that the judgment against Laraine is not based on her default, it would have to be reversed in any event. No evidence was put in at the trial and no evidence is cited in the statement of decision suggesting Laraine did anything other than sign transactional documents requiring her signature as trustee of the Grenier Trust. It appears her signatures were not even authenticated at trial. Laraine is barely mentioned in the statement of decision except to note she failed to appear for trial.[16]

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[14] Code of Civil Procedure section 425.11 provides in relevant part that in personal injury and wrongful death actions, "a statement setting forth the nature and amount of damages being sought" must be served on the defendant in the same manner as a summons "before a default may be taken." No such statement of damages or proof of service of a such a statement appears in the record.

[15] The petition's elder abuse cause of action sought damages for physical and emotional harm to Mary, among other damages.

[16] Notice of trial to Laraine was improperly served on Laraine by mailing a joint notice addressed to Albert at his private mailbox address. (See Code Civ. Proc., § 594, subd. (a).) The trial court's finding of compliance with section 594 in its statement of

There was no evidence she had any knowledge concerning the value of the subject property, the validity of Mary's signature, or the way in which the transaction came about. There is demonstrably no substantial evidence supporting a judgment against her for financial elder abuse, conspiracy with Richard, or bad faith warranting an award of double damages.[17] After the trial, Laraine was never properly served with Roback's request for a statement of decision so the tentative decision finding Richard solely liable for elder abuse arguably became final as to her. For multiple reasons, the monetary judgment against Laraine cannot be sustained regardless of whether it was improperly taken by default.

B. *Purported Judgment against the Grenier Trust*

The summonses served on Albert and Laraine in this case stated they were being served as individuals, not as trustees for the Grenier Trust. Code of Civil Procedure section 412.30 provides: "In an action against a corporation or an unincorporated association (including a partnership), the copy of the summons that is served shall contain a notice stating in substance: 'To the person served: You are hereby served in the within action (or special proceeding) on behalf of (here state the name of the corporation or the unincorporated association) as a person upon whom a copy of the summons and of the complaint may be delivered to effect service on said party under the provisions of (here state appropriate provisions of Chapter 4 (commencing with Section 413.10) of the Code of Civil Procedure).' If service is also made on such person as an individual, the notice shall also indicate that service is being made on such person as an individual as well as on behalf of the corporation or the unincorporated association. [¶] If such notice does not appear on the copy of the summons served, *no default may be taken against such*

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decision is unsupported by the record. This further supports reversal of the judgment against Laraine. (*Bird v. McGuire* (1963) 216 Cal.App.2d 702, 713.)

[17] Since the conduct alleged against Laraine arose solely from her ownership or control of Grenier Trust property, there was also a failure to prove personal fault—that Laraine acted negligently or intentionally, and owed Mary or Roback a duty of care. (Prob. Code, §§ 18001, 18002; *Haskert v. Villas at Desert Falls* (2001) 90 Cal.App.4th 864, 877–878.)

corporation or unincorporated association or against such person individually, as the case may be." (Italics added.) From this, appellants submit the court lacked jurisdiction to enter judgment against the Grenier Trust or against any trustee thereof in their representative capacity.

Roback maintains the trust did not need to be named a party since it was not a legal entity separate from cotrustees Albert and Laraine. Roback is correct. (See *Portico Management Group, LLC v. Harrison* (2011) 202 Cal.App.4th 464, 473 (*Portico*).) However, as also stated in *Portico*, a trust also cannot sue or be sued, and a judgment against a trust is meaningless and cannot be enforced. (*Id.* at pp. 473–474.) To be enforceable against trust property, a judgment must be entered against the trustees. (*Id.* at p. 474.) Thus, "the proper procedure for one who wishes to ensure that trust property will be available to satisfy a judgment . . . . [is to] sue the trustee in his or her representative capacity." (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1349 (*Galdjie*); see also Prob. Code, § 18004.)

In this case, although the Grenier Trust was named as a respondent to the petition, Albert and Laraine were named and served with summonses only in their individual capacities, not as trustees. Roback's failure to sue Albert or Laraine in their representative capacities was arguably waived by their failure to raise the issue in the trial court. (*Galdjie, supra*, 113 Cal.App.4th at pp. 1342–1343.) However, the judgment in this case is also solely against Albert and Laraine in their individual capacities, although it also purports to be against the Grenier Trust. In our view, the question of whether the court obtained jurisdiction over the trust is therefore irrelevant. Regardless of jurisdiction, the judgment by its own terms does not run against any trustee and to the extent it purports to be against the Grenier Trust, the judgment is a nullity. (*Portico, supra*, 202 Cal.App.4th at pp. 473–474.) Whether the modified judgment against Albert as an individual to be entered as a result of this appeal will be enforceable against trust property is outside the scope of this appeal. (See *Galdjie,* at pp. 1343–1350.)

We therefore vacate the purported judgment as to the Grenier Trust because it is ineffectual.

C. *Procedural Error*

For the reasons stated to this point, the judgments against Laraine and the Grenier Trust cannot be sustained. Albert additionally contends the judgment against him must be reversed due to procedural errors by the trial court. He argues it was prejudicial error for the court to (1) adopt Roback's proposed statement of decision despite her noncompliance with the applicable rule of court, (2) use a preponderance of the evidence standard of proof for finding financial elder abuse and imposing a punitive award of double actual damages, (3) impose double damages despite finding in its decision after trial Roback had unclean hands, and (4) make findings adverse to him based on Richard's deemed admissions. We are not persuaded.

First, we reject the argument Roback's request for a statement of decision was untimely because it was not filed within 10 days after service of the tentative decision, as required by rule 3.1590(d) of the California Rules of Court.[18] It appears from the record the request was in fact timely served and timely submitted for filing, but was not permitted to be filed until more than three months after its submission. Had Albert objected to the untimeliness of the eventual filing in these circumstances, the court undoubtedly would have relieved Roback of any asserted noncompliance with California Rules of Court, rule 3.1590(d), as expressly permitted by rule 3.1590(m). Since Albert made no objection in the trial court, he waived the procedural argument based on rule 3.1590(d). (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184–185, fn. 1 [appellate court will ordinarily not consider procedural defects where an objection could have been but was not presented to the lower court].)

Albert next argues Roback's proposed statement of decision was untimely under California Rule of Court, rule 3.1590(f), which specifies that if a party requests a statement of decision, and the court orders a party to prepare a proposed statement of decision and proposed judgment, the party must serve and submit the documents to the

[18] The rule provides that a request for a statement of decision must be served and filed within 10 days after service of the tentative decision.

court "within 30 days after . . . service of the tentative decision." Here, the court did not order Roback to prepare and file a proposed statement of decision until August 25, 2011, more than three months after service of the tentative decision. But that delay was not caused by Roback. She filed the documents six days after the court entered its order that she file them. Again, had the issue been raised in the trial court, the court would have excused Roback's technical noncompliance with the 30-day deadline since it was caused by the court's own delay in recording the filing of Roback's request for a statement of decision that had been timely submitted for filing. By failing to raise the issue in the trial court and permitting the trial court to rule on it, Albert waived any objection on this ground. His objection to the court's failure to hold a hearing on Roback's proposed statement of decision—made for the first time on appeal—was waived as well.

Albert further objects the court committed an error of law by holding him liable for actual and punitive damages (double damages under Prob. Code, § 859) on a mere preponderance of the evidence, when clear and convincing evidence was required. He submits the standard of proof in this case is the clear and convincing evidence standard in effect in 2002, because the amendments to the Elder Abuse Law eliminating the higher standard, which became effective January 1, 2005, were a substantive change in the law that did not operate retroactively. (See Stats. 2004, ch. 886, §§ 3, 4, pp. 6766–6767.)

Albert's position on retroactivity is untenable. The amendments effective in 2005 would not be deemed to have retroactive effect as long as they applied, as in this case, to a trial commencing after their effective date. In *ARA Living Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556 (*ARA Living Centers*), a case involving earlier amendments to the elder abuse statutes, another division of this court held there would be no retroactivity problem in applying new statutes relating to remedies and modes of procedure to an already-existing cause of action. (*Id.* at pp. 1561–1562.) Thus, the court upheld the application of a newly enacted attorney fee provision to preexisting elder abuse causes of action, citing numerous appellate decisions holding that attorney fee statutes address the "conduct of trials" and could be applied to trials for causes of action accruing before the effective date of the statutes. (*Id.* at p. 1562; see also *Mundy v.*

Superior Court (1995) 31 Cal.App.4th 1396, 1406 [procedural changes concerning the order and burden of proof address the conduct of trials which have yet to occur and are properly characterized as prospective only]; *Murphy v. City of Alameda* (1992) 11 Cal.App.4th 906, 912 [a new statute is considered to be procedural and is deemed to be operating only prospectively when it is applied to the conduct of trials occurring after its effective date, even though the trial deals with facts existing prior to that date; statutes which change the legal consequences of the parties' past conduct are considered substantive].) In our view, the 2004 amendments to the Elder Abuse Law could properly be applied in a trial occurring after their effective date, as in this case, even though the facts giving rise to the cause of action occurred in 2002. As stated in *ARA Living Centers*, " 'procedural statutes . . . become operative only when and if the procedure or remedy is invoked, and if the trial postdates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action.' " (*Id.* at p. 1561, quoting *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 394.)

With regard to the double damages imposed pursuant to Probate Code section 859 for the value of property belonging to the estate that "has in bad faith [been] wrongfully taken, concealed, or disposed of," appellants cite no case law, and we have found none, showing the standard of proof for applying such damages is other than a preponderance of the evidence. That is significant since "[s]ome version of this civil penalty statute has been operative since 1850." (*Estate of Kraus* (2010) 184 Cal.App.4th 103, 111.) While section 859 does impose a " 'species' " of punitive damages (*Estate of Young* (2008) 160 Cal.App.4th 62, 92), this fact alone does not entail a special standard of proof. Except as otherwise provided by law, the standard of proof in civil matters is preponderance of the evidence. (Evid. Code, § 115.) The Assembly Judiciary Committee comment to this section of the Evidence Code specifies that preponderance is the standard "unless a heavier or lesser burden of proof is specifically required in a particular case by constitutional, statutory, or decisional law." (Assem. Com. on

Judiciary com., 29B pt. 1A West's Ann. Evid. Code (2011 ed.) foll. § 115, p. 17.) Appellants fail to show that is the case here.

Although the trial court stated its intention to deny punitive or double damages against Richard in its decision after trial, citing Roback's "unclean hands," the trial court was not bound by that determination when it issued its statement of decision. A "tentative decision does not constitute a judgment and is not binding on the court." (Cal. Rules of Court, rule 3.1590(b).) The final written statement of decision is controlling, and makes no finding or mention of unclean hands in connection with the award of double damages against Albert or Richard.

Finally, appellants submit the trial court treated certain deemed admissions by Richard as being binding against them. We agree Richard's deemed admissions—especially his admission Mary's signature on the 2002 deed was forged—were not binding on appellants and should not have been treated as such. (See Code Civ. Proc., § 2033.410, subd. (b) [party's admission is only binding on that party].) However, we do not find the court relied on Richard's deemed admissions in finding Albert assisted or conspired with Richard to commit financial elder abuse. There was ample other evidence of Mary's impaired mental status and of Albert's involvement in the 2002 transaction to support a liability finding against Albert based on a preponderance of the evidence. The trial court made an express finding that the evidence presented at trial established the elements of financial elder abuse independently of Richard's deemed admissions.

While there were procedural irregularities in the conduct of the trial and posttrial proceedings, and Albert was no doubt disadvantaged by not having legal representation to fully protect his interests, he assumed responsibility for his own defense and must be treated like any other party. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.)

D. *Damages Issues*

Appellants challenge the damages awarded against them as excessive and improper. We agree in part. We confine our discussion to the damages awarded against

Albert since we have determined no award was proper against Laraine or the Grenier Trust.

First, we find the trial court plainly erred in awarding damages against Albert premised on disinheriting Richard under Probate Code section 259. Section 259 states that a person "proven by clear and convincing evidence" to be liable for financial elder abuse of the decedent shall not, provided certain other conditions are also met, "receive any property, damages, or costs that are awarded to the decedent's estate . . . whether that person's entitlement is under a will, a trust, or the laws of intestacy . . . ." (*Id.*, subds. (a), (c).) As noted earlier, section 259 does not necessarily disinherit an abuser entirely, but limits his right to retain any benefit through inheritance from the estate's recovery of damages for his abuse. This statute clearly has no application to Albert. He was neither found liable for financial elder abuse by clear and convincing evidence, nor is he eligible as an heir or beneficiary of Mary's estate to receive any benefit from the elder abuse damages awarded in favor of the estate. Since Albert has no "entitlement under a will, a trust, or the laws of intestacy" to any portion of Mary's estate, he has no obligation to give up such entitlement as to any portion of the damages recovered by the estate in this proceeding.

Further, Richard's liability under Probate Code section 259 cannot be shifted to Grenier under a conspiracy theory. Section 259 is intended to preclude the abuser from obtaining a financial benefit from his own wrongdoing as an heir or beneficiary of the abused person. Since the potential liability assessed by the statute exists only if the abuser is an heir or beneficiary, a third party not in line to receive anything from the victim's estate cannot be held vicariously liable under it. Finally, even if a person is found to be disinherited under section 259, amounts assessed under that section cannot be subject to doubling under section 859. By its own terms, the latter statute applies only to the value of "the property recovered by [the] action" that had been "taken . . . through the commission of elder . . . financial abuse." (Prob. Code, § 859.) The wrongdoer's share of the estate's elder abuse recovery as an heir or beneficiary under section 259 is not property taken from the estate through the commission of elder abuse**.**

It was therefore error to assess Albert for $653,423.31 in actual damages (and then to double that amount under Prob. Code, § 859) when that figure included $394,805.48, which was assessable only against Richard—the only beneficiary of the estate proven by clear and convincing evidence to have committed the financial elder abuse for which damages are to be awarded.[19] Albert's compensatory damages exposure, and the only amount subject to doubling under section 859, is limited to no more than $258,617.83.

Appellants question how $258,617.83 in actual damages could be awarded to equalize the shares of two beneficiaries in a property interest valued at no more than $500,000. They point out Roback and her mother had already received approximately $265,000 as a result of the transaction (including the proceeds of settlements with the title company and a notary involved in the 2002 transaction). While the basis for the $258,617.83 figure is murky on the record before us, appellants fail to meet their burden of proving it is erroneous. As discussed *ante*, we also find no error in doubling that award pursuant to Probate Code section 859.

However, we find the trial court erred in awarding prejudgment interest on the doubled amount. (See *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 662–664 [no prejudgment interest on punitive damages].) Further, the 10 percent per annum prejudgment interest rate used in the judgment applies only in contract actions. (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 774–775.) "Absent a statutory provision specifically governing the type of claim at issue, the prejudgment interest rate is 7 percent under article XV, section 1 of the California Constitution." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 573.) Roback has cited no statutory provision for 10 percent prejudgment interest. We

[19] The figure of $394,805.48 is the difference between the amount necessary to equalize the distributions to Joan and Richard ($258,617.83) and the amount asserted in the statement of decision to be the total adjustment necessary to disinherit Richard under Probate Code section 259 ($653,423.31). We are unable to determine from the record before us how the $653,423.31 figure was calculated.

recalculate prejudgment interest and modify the judgment against Albert to reflect these adjustments.

III. DISPOSITION

The judgments against appellants Laraine Grenier and the Grenier Trust (referred to as "Grenier Family Trust" in the judgment) are vacated. The judgment as to appellant Albert Grenier is modified to reduce Roback's recovery from $1,306,946.62 to $517,235.66, plus prejudgment interest of $78,447.41 (interest on the amount of $258,617.83 at the rate of seven percent per annum for 52 months). The judgment as to the Bertolina parties is not affected by this appeal. Costs on appeal are awarded to appellants. (Cal. Rules of Court, rule 8.278(a)(3).)

_____
Margulies, Acting P.J.

We concur:

_____
Dondero, J.

_____
Banke, J.